

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
MISC. CIVIL CAUSE NO.9 OF 1995

TANZANIA BIG GAME SAFARI APPELLANT

VERSUS

1. DIRECTOR OF WILDLIFE

2. ATTORNEY GENERAL RESPONDENT

R U L I N G

BUBESLI, J.

This application, filed under certificate of urgency, is made under Sections 66(e) and 95 of the CPC for orders that this Court set aside an ex parte judgment entered against the applicant be allowed to file his papers in defence of the application so that the matter is heard interparties, and that costs to abide the results.

The application has the support of the affidavit of SAZI BUNDARA SALULA learned Senior State Attorney. Appearing for the applicant was Mr. Songoro, State Attorney while the respondent was being represented by Mr. E. Nyange learned counsel.

The genesis to this application is as follows.

On 16/6/95 Hon. Kyando J. who was previously assigned to handle the main application, disqualified himself from further dealing with the same and the matter was then re assigned to Hon. Bubesli, J. Appearing on that date before Kyando J as per the record in the file were Salula and Werema Senior State Attorneys for the respondents and Mr. Nyange, appeared for the applicant. On 26/7/95 the Senior Deputy Registrar fixed the hearing date to be 24/8/95 and parties were to be notified accordingly. Pursuant to that Order a summons was duly issued informing parties to appear before Bubesli, J on 24/8/95. The applicants were served on 7/8/95 while the respondents were served on 25/7/95. Subsequent to that, the applicants were on 22/8/95 served with the respondents chamber summons wherein it was indicated that the matter would be heard on 24/8/95 before Hon. Kyando, J. This is where,

it appears some confusion arose because the name on the document of Hon. Kyando, J. remained unaltered although His Lordship had since 16/6/95 disqualified himself from further dealing with the matter. This is when the affidavit of Mr. Salula comes into the scene.

As deposed to in paras 2 & 4 the applicants were served on 22/8/95 with a chamber summons ordering them to appear before Hon. Kyando, J on 24/8/95. Mr. Salula has deposed further that, on the particular day he proceeded to the Chambers of Justice Kyando where he was informed by the judges clerk that the matter was not before Justice Kyando, so he left the court. That as per para 7 of his affidavit, Mr. Salula could not know that the matter was called before Madam Justice Bubeschi whose office is located on the lower ground to that of Justice Kyando. Essentially, Mr. Salula is contending that their non appearance in court on 24/8/95 was not due to any other cause but the Chamber summons which directed them to appear before Kyando, J and not Bubeschi, J.

Mr. Nyange for the respondents objected strongly to the application. He has attacked the chamber application as being bad in law as it seeks for two orders which cannot be sought at the same time. That to ask the court for leave to file their defence at this juncture is untenable as same ought to have been filed while the matter was before Hon. Kyando, J. Mr. Nyange has also attacked the affidavit as the applicants had all the time to file one after being served with a copy of the application. Thirdly, Mr. Nyange objects to the application as in his view, the applicant has not obeyed the courts order to restore the blocks hence coming to this court with unclean hands.

Mr. Nyange had also countered that Mr. Salula has not appeared before in this matter and on that particular day Mr. Salula was not in Court. And if he did, he should have known that Hon. Kyando, J had disqualified himself from hearing the application hence it could not have come before Hon. Kyando, J. again. Mr. Nyange further deposed that Mr. Salula would have known that the matter was coming up for hearing before Bubeschi, J. had he consulted the weekly cause list for 24/8/95 and Hon. Judge Kyando had disqualified himself in presence of Mr. Werema S.S. Attorney on 16/7/95. Hence the failure to appear was a result of Mr. Salula not knowing about the case at all. All in all Mr. Nyange prayed that the application be dismissed with costs.

As indicated earlier on in my ruling, this matter was being heard by Hon. Kyando, J. On 16/6/95, the court record shows that Mr. Salula and Mr. Werema, Senior State Attorneys entered appearance for the respondents while Mr. Nyange appeared for the applicants. Hon. Justice Kyando formally disqualified himself from further dealing with the main application and the matter was to be placed before the Hon. J. i/c. for reassignment. On 26/7/95 the Senior Deputy Registrar ordered that the application come up for hearing on 24/8/95 before Hon. Justice Bubeshi and parties were served accordingly. The court file record shows that the Hon. Attorney General was served with a summons on 7/8/95 for him to appear on 24/8/95. A chamber summons which had not been sent to the applicants (Hon. Attorney General) was also sent on 22/8/95 wherein it was indicated that the matter is coming up for hearing before Hon. Kyando, J. on 24/8/95. It is a fact when this chamber summons was filed in court on 6/6/95, the same bore the name of Hon. Kyando, J. who was assigned to deal with the matter. Hence through oversight, I think the same document was sent on 22/8/95 to the applicant without making the necessary amendment that is, by deleting on it the name of Hon. Kyando, J. and substituting thereon the name of Hon. Bubeshi, J. who had been assigned to handle the application on 26/7/95.

The applicants argument is that they were summoned to appear on 24/8/95 before Hon. Kyando, J and not before Hon. Bubeshi J. As much as I agree that a chamber summons was served to the applicants on 22/8/95 for them to appear before Hon. Kyando, J. on 24/8/95, it was equally clear that as early as 16/6/95 that Hon. Kyando, J had disqualified himself from further dealing with this application and hence a summons was served on them as early as 7/8/95 for appearance before Bubeshi J. on 24/8/95. Mr. Salula has served that on 24/8/95 he duly appeared before Hon. Kyando's J. in chambers where he was informed that the matter was not before Hon. Kyando J. What did he do after that? He simply left the premises. Had he consulted his file, he would have discovered that this matter was now before Hon. Bubeshi J. and a summons of 7/8/95 bears that out. Secondly a casual glance at the weekly cause list would have shown that the matter was coming up that day before another judge and not Hon. Kyando J. I think with all respect, an attorney of the calibre and experience of Mr. Salula would not just walk away from the court premises and let the matter rest assuming that is, he was there in the first instance. And assuming further that he was not in court on 16/6/95, then Mr. Salula was not

properly briefed by Mr. Werema whom it is recorded to be present. Both counsels are senior officers in the Applicant office and this court expects a better performance than is evident from this case. Had they exercised some due diligence, they would not find themselves in this somewhat awkward situation.

I am satisfied, as I have endeavoured to explain above, that the applicants were so served to appear before Hon. Bubeshi J on 24/8/95. I am fortified in this view by the practice that, once a judge has disqualified himself from hearing a certain matter, he would not as matter of practice take up the same matter again. The applicant were not diligent enough in assuming that the matter would come up before Hon. Kyando, J again, or else their record of this case is somewhat wanting.

In the find event I decline to grant the application to set aside the ex parte judgment entered against the applicant on 13/9/95. The application is dismissed with costs.

A.G. Bubeshi
JUDGE.
13/12/95.

Delivered before Salula for Applicant and
Nyange for Respondent.

~~Salula: Nyando J~~, I pray for leave to appeal to CA under O 43 a(1) (a) of the CA Rules 1979.

Nyange: I prefer a formal application so that I know the grounds of appeal. I therefore ask for a formal application.

Order: Leave to appeal to be formally made to this Ct.

A.G. Bubeshi
A.G. Bubeshi
JUDGE.

13/12/95